

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. LINDON BOTTOMS

Direct Appeal from the Circuit Court for Grundy County
No. 3883-PR Thomas W. Graham, Judge

No. M2006-00442-CCA-R3-CD - Filed February 6, 2007

The defendant, Lindon Bottoms, appeals from the trial court's order revoking his probation and reinstating his original sentence of three years. On appeal, the defendant presents two issues for review: (1) whether the trial court erred in allowing testimony of the defendant's failure to report to a probation officer because this violation was not included in the probation violation warrant; (2) and whether the trial court erred in allowing hearsay testimony regarding the defendant's criminal record. Following our review of the parties' briefs and applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Phillip A. Condra, District Public Defender and Robert Morgan, Assistant Public Defender, Jasper, Tennessee, for the appellant, Lindon Bottoms.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steve Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

On January 14, 2004, the defendant was convicted by a Grundy County jury of passing worthless checks over \$1000 and was sentenced to three years. The court suspended the defendant's sentence and placed him on supervised probation with the Board of Probation and Parole. On November 9, 2004, a probation warrant was issued alleging that the defendant violated his probation by failing to make restitution and by failing to report for his weekend jail service. Thereafter, a probation revocation hearing was held on February 13, 2006.

At the hearing, Jeff Thomas, the defendant's probation officer, testified that he had filed a probation revocation warrant because the defendant had not paid any restitution and had only served one weekend of his fifteen weekend jail service. Thomas further stated that the defendant had failed to report. However, Thomas admitted that he had not included this violation in the warrant. Thomas also admitted that he told the defendant to report to Jennifer Creighead, another probation officer "so we didn't make [the defendant] come to Grundy County." Thomas admitted that it would have been better to have transferred the file to Creighead, but he explained that the "system" did not allow a probationer's file to be open in two counties simultaneously. Thomas noted that he told the defendant to report to Creighead and expected the defendant to do so.

On cross-examination, Thomas admitted that he only saw the defendant one time "[o]ther than the court day." Thomas stated that the defendant told him where he lived, but Thomas was not informed as to the defendant's financial status. Thomas admitted that he did not bring anything to the hearing to verify his findings as to the defendant's jail service. However, Thomas stated that prior to filing the warrant, he checked the defendant's jail service by speaking with the jailer in person. Thomas explained that when checking "jail time" he normally speaks with the jailer and relies on the information provided by the jailer. Thomas also stated that he looked at the books and only "saw that [the defendant] had showed up on that one weekend."

Jennifer Creighead testified that she was a probation officer for the Board of Probation and Parole. She stated that the defendant was placed on her case load because of a conviction arising out of DeKalb County. She started supervising his probation in November 2003. Creighead testified that she also had to issue a probation violation warrant because the defendant had not paid restitution in full by the expiration date. Creighead also noted that the defendant had not reported to her.

Tom Birdwell testified that the defendant had written him worthless checks for nursery stock. The defendant had promised him in the courtroom to pay \$100 a month in restitution. However, he had "[n]ot seen a nickel" of restitution from the defendant.

Jess Bottoms, the defendant's son, testified that the defendant was living in an apartment complex which allowed payments based on the defendant's income. Bottoms stated that the defendant had little income and paid a small amount of rent each month. The defendant did not have "any income until . . . he got set up on disability" a couple of months ago. The defendant then got \$500 a month. Bottoms also stated that the defendant had medical problems that restricted his ability to work.

Jennifer Creighead was recalled to testify as to some of the defendant's prior convictions. She stated that based on the post-sentence report, the defendant had prior convictions for writing worthless checks and had what appeared to be a DUI or DWI. While Creighead acknowledged that she did not create the report, she stated that the report was part of her records kept in the normal course of her business and she was the custodian of these records. The defense objected to testimony

regarding the defendant's prior convictions, stating that none of the records were certified. The court overruled the objection.

Based upon the testimony at the hearing, the court revoked the defendant's probation and ordered him to serve the remainder of his sentence in confinement. In so doing, the court stated the following:

[The defendant] has several previous similar convictions resulting in probation. He has a specific duty to report for jail service which he did not do. He was told to pay [a] certain amount of money on restitution. . . . [H]e's not done really anything that was required of him for this probation

. . . .

[I]t's not even contested that he didn't report to the jail service, so that's 15 weekends that he did not report, but one time apparently and that's not contested, that's proof. He . . . also did not report to any probation officer, although that's not an allegation in the [warrant], but that's part of what you can consider I think, the overall thing, he hasn't reported, nobody seen him apparently since November He has also made no restitution of any kind that's certainly proof and his position is precarious in that he has a fairly long history of [writing] bad checks . . . and he is old enough to know better . . . , so at any rate I think it's unfortunate from his standpoint, but my goodness he did it to himself

ANALYSIS

On appeal, the defendant challenges the trial court's revocation of his probation. The defendant first argues that the court erred in allowing testimony of the defendant's failure to report to a probation officer because this allegation was not included in the probation violation warrant.

We begin our review by noting that the decision to revoke probation lies in the sound discretion of the trial court. *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995). The trial court may revoke probation upon finding by a preponderance of the evidence that the defendant has violated the conditions of his or her probation. *See* Tenn. Code Ann. §§ 40-35-310, 311(e); *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. *Harkins*, 811 S.W.2d at 82. If the trial court has exercised "conscientious judgment in making the decision rather than acting arbitrarily," then there is no abuse of discretion. *Leach*, 914 S.W.2d at 107. Discretion is abused only if the record contains no substantial evidence to support the trial court's conclusion that a violation has occurred. *Harkins*, 811 S.W.2d at 82; *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997).

It is well-settled that probationers have a liberty interest which must be protected by minimum standards of due process of law. *State v. Wade*, 863 S.W.2d 406, 408 (Tenn. 1993); *see*

also *Black v. Romano*, 471 U.S. 606, 611 (1985). In *Gagnon v. Scarpelli*, the United States Supreme Court adopted several factors illustrative of the “minimum requirements of due process” in a probation revocation proceeding. These include:

(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or [lawyers]; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.

411 U.S. 778, 786 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). The use of alleged probation violations not contained in the probation violation warrant constitutes a due process violation. See *State v. Roger McCormick*, No. 01C01-9312-CR-00437, 1994 WL 567987 *3 (Tenn. Crim. App., at Nashville, Oct. 13, 1994).

Upon review, we agree with the defendant that the “minimum requirements of due process” would not permit consideration of the defendant’s failure to report because the defendant was not given written notice of this alleged violation in the warrant. However, the record reflects that the court considered evidence that the defendant violated his probation by failing to make restitution and by failing to report for his weekend jail service – the two violations included in the warrant. Indeed, while the court mentioned violations not reflected in the warrant, the record establishes that the court revoked the defendant’s probation based upon a preponderance of evidence that the defendant violated the terms of his probation by not paying restitution and not reporting for his weekend jail service. As such, we conclude that the court did not abuse its discretion in revoking the defendant’s probation. The defendant is not entitled to relief on this issue.

As his second issue, the defendant argues that the trial court erred in allowing hearsay testimony regarding his criminal record. Specifically, the defendant argues that the testimony regarding his criminal record was not supported by foundation that the record was prepared by someone with first-hand knowledge. Upon review, we conclude that the testimony of the defendant’s criminal record was properly admitted. It is well-settled in Tennessee that a trial court has statutory authority to admit trustworthy and probative evidence, including hearsay, for sentencing purposes. *State v. Flynn*, 675 S.W.2d 494, 498 (Tenn. Crim. App. 1984); see also Tenn. Code Ann. § 40-35-209(b). Reliable hearsay is admissible in a probation revocation hearing so long as the opposing party has a fair opportunity to rebut the evidence. See *id.* § 40-35-209(b). This court has previously established that a presentence report is considered to be reliable hearsay, making it unnecessary in most instances to introduce certified copies of convictions. See *State v. Adams*, 45 S.W.3d 46, 59 (Tenn. Crim. App. 2000).

Here, the record reflects that Creighead testified that she was a custodian of the defendant's post-sentence report. Although she admitted that she did not prepare the report, she stated that the report was kept in the normal course of business. Additionally, it appears from the record that the defendant had proper opportunity to refute the veracity of Creighead's testimony via cross-examination. Therefore, we perceive no error in the admission of Creighead's testimony regarding the defendant's prior criminal record. However, regardless of the admissibility of the defendant's prior criminal record, the testimony presented at the probation violation hearing established by a preponderance of the evidence that the defendant violated the terms of his probation. Accordingly, the court did not abuse its discretion in revoking the defendant's probation. The defendant is not entitled to relief on this issue.

CONCLUSION

The judgment of the trial court is affirmed.

J.C. McLIN, JUDGE